

SUPREME COURT JUSTICES

QUIZ COUNSEL FOR STATE

Opposing Lawyers in
Frank

Case Questioned by
All Ex-

cept Justice
Lamar

BY RALPH SMITH

WASHINGTON, Feb. 26.—In concluding his Argument on the Habeas Corpus Appeal of Leo M. Frank, before the Supreme Court this morning, Louis Marshall, of New York, insisted that the verdict returned at the trial was a nullity and that the Judgment based upon it was also a nullity.

Warren Grice, Attorney General of Georgia, followed Marshall and was in the midst of his Argument when the Court took a recess at 2 o'clock for lunch. He resumed at 2:30 and was followed by Solicitor General Dorsey who prosecuted Frank.

Every member of the Court was on the bench and asked questions of the opposing Counsel. Associate Justice Lamar alone remained silent.

Mr. Justice Hughes brought out in questioning Attorney General Grice that in Frank's first Application for a new trial, the statement was made that the Defendant was out of the Court Room when the Jury returned its verdict. This was not mentioned, however, as one of the grounds on which a new trial was asked, said Mr. Grice.

HUGHES ASKS QUESTIONS.

Justice Hughes asked a number of questions on this point and also on the State's legal procedure in Georgia. Mr. Grice read from the Supreme Court's decision on Frank's first Application, as reported in 141 Georgia Reports. Therein, it was recited that only two instances of disorder during the trial occurred within the hearing or knowledge of the Jury. Both times the Court rebuked those making the disorder and threatened to exclude onlookers the following day.

"The action of the Court was deemed satisfactory at the time, and the orderly trial of the Case was resumed without further question," said the Georgia decision.

Mr. Grice denied the statement of Marshall, that the allegations made by Frank's Counsel in their Brief were admitted.

“We take the position,” he said, “that on the Record presented to the District Judge, there is an absolute denial of these allegations.”

Associate Justice Hughes reviewed briefly the various legal steps which have been pursued by Frank’s Counsel since the verdict of guilty was rendered.

Mr. Grice said the Georgia Supreme Court had held that the verdict was not a nullity but on the alleged fact that the Court had lost jurisdiction of the Prisoner.

Increased interest in the Argument of the Case was evidenced this noon when the Court met. The Room was crowded to capacity with Lawyers, laymen and a great number of stylishly-gowned women, while a long line formed in the corridor awaiting entrance.

Louis Marshall, of Counsel for Frank, presented Henry C. Peeples to the Court for admission, following which the New York Lawyer resumed his Oral Argument on behalf of the condemned man. It is not the purpose of Mr. Peeples to address the Court.

The contentions of the Attorneys revolved around whether the trial Court had lost Jurisdiction over the Prisoner either by fear of “mob violence” manifested throughout the trial, or by Frank’s absence from the Court Room when the Jury returned its verdict. Other points concerned questions as to whether the Writ of Habeas Corpus was the proper remedy in view of all that had taken place in the Case.

MARSHALL’S ARGUMENT.

Contending that the trial Court, which found Frank guilty of the murder of Mary Phagan, had lost its Jurisdiction over the Prisoner because of mob violence tolerated during the trial and because of the consequent absence of the Prisoner from the Court upon the “coercion” of the trial Judge when the verdict was rendered, Attorneys for Frank yesterday argued before the

Supreme Court of the United States that he should be freed from custody. Louis

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SUPREME COURT JUSTICES QUIZ COUNSEL FOR STATE

(Continued from page one.)

Marshall, of New York, began the opening Argument in the Case and will continue it today, when the representatives of the State of Georgia also will be heard.

The Court was considering the Appeal from the Action of the Federal District Court for Northern Georgia in denying Frank's release from custody in which he was placed for the execution of the death sentence imposed by the trial Court.

Mr. Marshall first stated the effect upon the Jurisdiction of the Court of Frank's absence when the verdict was rendered. His statement that Judge Roan, of the trial Court, coerced Frank into his being absent was questioned by Chief Justice White. Mr. Marshall declared the suggestion by the trial Judge, that Frank's life and limb and those of his Counsel might be in danger if they attended, amounted to coercion.

The Attorney sought to establish that the right to be present at one's trial was one that could not be denied.

"We have held that a Court may abolish a trial by jury, and I do not see why a State may not abolish one of the incidents to a jury trial," interrupted Justice Pitney. "The decisions you cite refer to Federal Cases."

Chief Justice White also asked questions along that line.

Mr. Marshall replied it was a question of due process of Law, and while the Fifth Amendment to the Constitution guaranteed due process in Federal Cases, the guaranty of Due Process in State Cases in the Fourteenth Amendment was the same in effect. He contended that while a State might abolish a trial by jury, it could not abolish the right to be present at whatever kind of trial was provided, because of "Due Process."

In the closing moments of the Session, Mr. Marshall took up the point of mob violence.

"I am free to confess that point is one that impresses me very much," volunteered Justice Holmes as the Attorney began his Argument.

"This Court has said that there must be a trial before a competent tribunal," began the Attorney. "A competent tribunal is one that holds the scales of Justice impartially, that is not swayed by fear or favor. Here the trial was marked by prejudice and hostility. There, jeers at Counsel for Frank were permitted when they lost a point. The crowds almost trespassed upon the Jury Box, hanging over the Jury Box and their whispers were heard throughout the Court Room. Applause greeted the Solicitor General when he appeared at the Seat of Justice, and then the Judge held a Conference in the presence of the Jury with the Chief of Police and a Commanding Officer of the State militia. That was a demonstration that probably had no parallel in the History of trials. Finally, the Court asked Counsel to meet him in Private Conference and then upon the insistence of the Court that the Prisoner might be torn from the Sanctuary of the Court and

lynched by a mob if he was present when the verdict was returned, Counsel consented to his being absent. The Jury was left to return its verdict to the Prosecuting Officer and the mob. They knew what that meant.

Justice Pitney inquired if the Georgia Supreme Court had not passed upon all these facts, whereupon Justice Holmes asked if Mr. Marshall did not mean that, if these were the facts, it did not matter if twenty Courts had passed upon them.

MARSHALL RESUMES.

Resuming his argument when the Court met today, Mr. Marshall quoted from the State's Brief that "it appears that the Agreement of Counsel that Frank not be present at the reception of the verdict was made in the interest of Frank and for his protection."

"For his protection against what?" asked Mr. Marshall. "Against the Law? Against the Constitution? Against his right to a Hearing on his trial? No. For his protection against the consequences of Lawlessness, of anarchy, or mob domination, of the control of the legal Proceedings under which he was entitled to be tried."

"Counsel come here and tell us it was for the protection of the Prisoner that the Court did this, and yet claim he was accorded all the ordinary, calm processes of the Law."

"Our contention is that in consequence of the circumstances which then existed, the Character of which was recognized by the presiding Judge, Law ceased to reign, terror ruled in its stead, and fear sat trembling in the Seat of Justice."

"The Court realized the bankruptcy of Judicial Procedure; recognized the protection of the Law had broken down and nothing remained except a domination, a coercive power. There was no longer a Court, no longer a trial; and no longer did the Court have any more Jurisdiction over the Prisoner than if Judge

Roan had been driven from the bench by a mob. The Court had been superseded by a Judicial lynching.”

WHITE ASKS QUESTION.

Chief Justice White asked Mr. Marshall if he thought a man who had been in the penitentiary for ten years, and whose conviction had been affirmed by a State Supreme Court of the United States, and by alleging things outside the Record of his trial, such as prejudice by the trial Judge, secure a Writ of Habeas Corpus on a question of Jurisdiction. The Attorney answered in the Affirmative.

“Then this Court would become a Court of General Jail delivery,” replied the Chief Justice.

Mr. Marshall replied it made no difference whether it was made ten years or one day after conviction, but the question was whether Constitutional questions of Jurisdiction could be kept from the Supreme Court by a State Supreme Court resting its affirmance on grounds of procedure and not Constitutional grounds.

“But we passed on that when we denied your Application for a Writ of Error,” responded the Chief Justice. “We have held a State Court could not deny our right to review by the way in which worded its ruling.”

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FRANK DEFENSE BRIEF

AND STATE'S ANSWER

Defense Charges That Although Mob Did No Violent Its Outbreaks Had Influence on Jury

Ten grounds, referred to as "points," are embraced in the brief filed with the United States Supreme Court by Leo M. Frank's Counsel. Each of these points is made the Sub-heading or Headnote to a Chapter in the Brief Book, which contains 227 pages, a large portion of which is devoted to Citations.

These Headnotes are as follows:

NOT PRESENT AT
VERDICT.

Point 1. The Reception by the Superior Court of the Fulton County of the verdict by which the Appellant was condemned to death, in his absence and without his Consent or Authority, and in the absence of his Counsel, was such a violation of Due Process of Law, within the meaning of the Fourteenth Amendment to the Constitution of the United

State's Answer to Defense's Brief to U. S. Supreme Court Says Frank Has Enlarged Allegations of Mob Influence

Although the State's Brief, answering and opposing Frank's Appeal to the United States Supreme Court, contains but eighty-eight pages, it is divided into seventeen subheads, and like the Defense Brief is given over very largely to a Citation of Authorities on the points involved.

The seventeen Subheads or Headnotes are as follows:

1. Status of the Case of the State of Georgia vs. Frank (insofar as same can be shown by reference to the Record now before this Court) as it was when the Supreme Court of Georgia passed upon Appellant's motion to set aside the verdict; and a comparison of this with the Allegations in the Application for Writ of Habeas Corpus.

WOULD OVERTURN
CONVICTION.

2. Appellant is asking this Court to grant him a Writ of

States, as to bring about a loss of Jurisdiction of the Court and nullification of the verdict and judgment.

Point II. Not only was the Appellant deprived of Due Process of Law, because he was by the Action of the Court, kept out of the Courtroom when the verdict was rendered, but the entire Proceedings became coram non judice, because of mob domination, to which the presiding Judge succumbed and which in effect wrought a dissolution of the Court.

Point III. The Right of the Prisoner to be present during the entire trial, including the rendition of the verdict, the Polling of the Jury, and its discharge, is one which neither he nor his Counsel could waive or abjure.

COULD NOT WAIVE RIGHT.

Point IV. It would seem to follow logically from the Propositions thus far discussed that if neither Frank nor his Counsel could expressly waive his right to be present at the rendition of the verdict, that Right could not be waived by implication or in consequence of any pretended ratification by him or acquiescence on his part in any Action taken by his Counsel.

Habeas Corpus which will virtually overturn his conviction in the State Court without submitting to the United States Courts important portions of the Record on which the judgment is based, and on which he is being held.

3. The Decision of the Supreme Court of Georgia holding that Frank had not adopted the correct Procedure in invoking in the State Court the effect of his absence when the verdict was received was not the Passage of an ex-Post Facto Law, but followed prior Decisions.

4. A Brief Discussion of the Decision of the Supreme Court of Georgia on the merits.

5. Every question presented by the Application for Habeas Corpus having already been presented by him to the State Court and its Decision invoked and its judgment rendered adverse to him, the Principle of Res Adjudicata applies and for that reason alone, the questions cannot be reopened here.

6. Where oral evidence is required to show want of Jurisdiction, Habeas Corpus will not discharge the prisoner.

NOT WRIT OF ERROR.

7. The Writ of Habeas Corpus cannot be made use of to perform the Functions of a Writ

Point V. If, therefore, Frank's absence at the Reception of the verdict constituted an infraction of Due Process of Law, which could not be waived, directly or indirectly, expressly or impliedly, before or after the Rendition of the verdict, the fact that he did not raise the Jurisdictional question on his motion for a new trial, did not deprive him of his Constitutional Right to attack the judgment as a nullity.

POINT VI. Even if the decision of the Supreme Court of Georgia were to be interpreted as deciding that a motion for a new trial is the only method by which the Constitutional Question with which we are now concerned, can be raised, then, we contend that such a decision as applicable to the present Case would be in conflict with the Constitution of the United States, because it would be an ex-Post Facto Law.

JURISDICTION LOST.

Point VII. It follows from the propositions thus far discussed that Appellant's Application for a Writ of Habeas Corpus is squarely based on the contention that, when the verdict against him was received and judgment was

of Error.

8. Irregularities, no matter how gross, will not be sufficient to obtain a release on Habeas Corpus.

9. A discussion of Due Process of Law. The incorporation of the Due Process clause in the Fourteenth Amendment does not result in an overturning of well settled Principles and established usages prevailing in States, nor to deprive the States of the Power to establish other Systems of Law and Procedure, or alter the same at their will.

10. Does the Fourteenth Amendment require the presence of a Defendant in Court at the Reception of a verdict?

11. The presence of a Defendant in Court at the reception of the verdict does not go to the Jurisdiction of the Court.

12. Waivers such as were made in this Case by the Prisoner's Counsel are binding on the Prisoner.

13. Frank cannot repudiate the Acts of his Counsel.

14. The Supreme Court of the United States will not grant the Relief asked by Frank in this Application in view of what was heretofore taken place in the Supreme Court of Georgia and

rendered against him the Court had lost such jurisdiction as it previously possessed, and the verdict and judgment under which he was detained were absolute nullities, thus making Habeas Corpus the proper remedy to test the validity of his detention thereunder.

Point VIII. The Appellant had, before applying for a Writ of Habeas Corpus, exhausted all of his remedies in the State Courts, and had ineffectually applied for a Writ of Error to review their determination. This remedy invoking the Federal Constitution for the protection of his life is, therefore, his last resort, and he conforms in every respect to the practice which the Court has pointed out as controlling in like Cases.

Point X. In the present Case, the Superior Court of Georgia had Jurisdiction over the Appellant after his indictment and down to the later stages of his trial. The verdict and all subsequent Proceedings, being nullities, he is entitled to his discharge from the void judgment and to be relieved from the void sentence of death. He does not, however, contend that he cannot be held for further trial

by the Supreme Court of the United States in denying him a Writ of Error.

15. The Supreme Court of the United States will not permit Frank to do by indirection that which it already has held Frank could not do directly.

16. The Supreme Court of Georgia had Jurisdiction to determine whether Frank's Counsel could waive his presence, and even if this Court should think that ruling Error, Habeas Corpus cannot correct it.

17. The Action of the Court in permitting Frank's Counsel to waive his presence, if erroneous, was a mere irregularity in the matter of procedure, and certainly Habeas Corpus cannot avail to discharge the prisoner.

In discussing the alleged disorders in the Court Room during Frank's trial, the State's Brief contends that he should have made his motion for a new trial at the time they occurred and calls attention to the fact that all of the questions raised in this connection have been passed on by the Georgia Supreme Court. On this subject, it says in part:

"The only difference between the questions submitted to the Courts of Georgia and the Federal Courts is that Frank does not present to the Federal

under the indictment.

The Second Chapter of the Brief deals at length with Allegations concerning mob influence. Among other things, it says:

MOB INFLUENCE.

“Instead of quelling the outbursts of the mob, or seeking to control its demonstrations, or asserting the Judicial Power and enabling Justice to pursue its uninterrupted sway, the Court surrendered and abdicated its functions, and temporized with those whose Lawlessness defied the duly constituted Authorities, at the decisive moments of the trial, and permitted itself to be coerced, by ominous threats of prejudice and by the terrors of violence, into denying one of the most substantial and elementary rights of the man whose steadfast insistence on his innocence had inflamed the hostile passions of his enemies. What the Court did at this important moment, which meant life or death to the accused, was a Judicial admission that the Administration of Justice had broken down, that its Proceedings were controlled by the mob, that it was powerless to protect the man

Courts as many grounds or as many instances of alleged disorder as he urged for a new trial in the State Court, but he has endeavored in his Application to the Federal Court to enlarge his Allegations as to the disorder with reference to the fewer instances which he does not see fit now to present in this Application.

“No motion for a mistrial, it will be seen by reference to this Record, was ever made by Counsel for Frank at the time said alleged disorder occurred, and where it occurred in the presence and knowledge of the Jury.”

“In other words, counsel for Frank did not at any times indicate to the Court any dissatisfaction with the Action that the Court took at the time upon whatever complaint is shown to have been presented to the Court, except in the two instances to which reference has been made.”

The State points out that “For over seven and nearly eight months, during which time he had been twice sentenced, had made two motions for a new trial, he had never presented to the State Courts or to the Federal Courts any proposition claiming a lack of due process of Law in that he was not present

on trial in his legal rights, and that fear of its Action hovered like an evil spell over the tribunal which was to hear and decide his guilt or innocence without intervention of unauthorized participants.

JURY IMPRESSED.

“It is true that neither Court nor the Jury was physically attacked, but it is impossible to believe, from the facts which stand uncontradicted on the Record, that the Jury was not made to feel that its only Function was to register the will of the mob. When the Jurors returned into the Court Room, and found the Prisoner absent, and his Counsel absent, with none to look into their faces but the excited multitude, and when, after the first Juror had been polled, the tumult of Applause and the cheers that were bellowed were so resounding as to prevent the responses of the Jurors as they were polled, from being heard ten feet away, is it possible to believe that the Jurors acted as free moral Agents, or that they were not subjected to a species of duress that swept from their minds every thought save that of personal jeopardy?”

“A trial amid such

when the verdict was rendered.”

With reference to the Allegation that the trial Court was swayed by the influence of the mob-spirit the State points out the Law providing for change of venue in Cases where it appears a Defendant may not obtain a fair trial and also the act which authorizes Judges to allow a change of venue on his motion. In this connection, the Brief says:

“The Record nowhere discloses that Frank, though he was represented by several Counsel, presumably in possession of a knowledge of the temper of the people of the Community, ever made any motion to change the venue, and hence it is a fair inference that whatever antagonistic public sentiment, if any, was developed at the time the matters referred to in ground 75 of the motion occurred, was brought about and grew out of the character of the evidence and the Case made by the State. Presumably, the Judge did his duty, and presumably there was no antagonistic sentiment on the part of the public to Frank at the time he started into his trial, for had there been, presumably the Judge, under the Authority of the Statute cited, would have, of his own motion, changed the

concomitants is a travesty. It is not a legal Proceeding. It is not conducted in a Tribunal in which Justice is administered in a secure and orderly manner, free from external coercive influences, calmly, soberly, without fear or favor, without passion or prejudice. It is rather a Tribunal where Law has been dethroned, where fear sits trembling on the judgment seat."

"A fair trial is universally recognized as one of the conditions without which Due Process of Law cannot exist."

venue; and if not, then, presumably, the public sentiment, if any, claimed by Frank to have been manifest during the trial, was the natural outgrowth and consequence of the evidence adduced on the trial of Frank for the heinous crime of murder."